

DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS: 02-0502
Sales and Use Tax
For Tax Period 1995-1998

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ISSUES

I. Sales and Use Tax—Out-of-state use

Authority: Ind. Code § 6-2.5-3-2; Ind. Code § 6-2.5-3-7

Taxpayer protests the assessment of use tax with respect to display tables that Taxpayer maintains were stored in another state.

II. Sales and Use Tax—Services

Authority: Ind. Code § 6-2.5-4-10

Taxpayer protests the assessment of use tax with respect to tangible personal property that it maintained was under the control of a third party providing installation of other property.

III. Sales and Use Tax—Out-of-state purchases

Authority: Ind. Code § 6-2.5-3-2; Ind. Code § 6-2.5-3-5; Ind. Code § 6-2.5-5-3; Ind. Code § 6-2.5-5-5.1

Taxpayer protests the assessment of use tax with respect to several items that it maintains were purchased for use outside Indiana.

IV. Sales and Use Tax—Real property improvements

Authority: Ind. Code § 6-2.5-4-9; 45 IAC 2.2-4-21 to -26

Taxpayer protests the assessment of use tax with respect to tangible personal property that was incorporated into real estate.

V. Tax Administration: Negligence Penalty

Authority: Ind. Code § 6-8.1-10-2.1; 45 IAC 15-11-2

Taxpayer protests the imposition of the ten percent (10%) penalty for negligence.

STATEMENT OF FACTS

Taxpayer is engaged in a variety of industries. Taxpayer operated a number of plants in Indiana and other states during the period in question. During the years in question the Department audited Taxpayer. As a result of the audit, use tax was assessed on a number of items. Several issues were resolved prior to hearing; however, several items remained in dispute. These items included use tax on display tables, items that Taxpayer maintained were for services rather than rental or leasing of tangible personal property, certain items that Taxpayer maintained were shipped to and used at facilities outside Indiana, and personal property that became part of Taxpayer's Indiana real estate. Taxpayer has also protested the imposition of penalties with respect to its assessment.

DISCUSSION

I. Sales and Use Tax—Out-of-state use

First, Taxpayer argues that its display tables were shipped to Michigan and stored in Michigan. Under Ind. Code § 6-2.5-3-7(a),

A person who acquires tangible personal property from a retail merchant for delivery in Indiana is presumed to have acquired the property for storage, use, or consumption in Indiana, unless the person or the retail merchant can produce evidence to the contrary.

Here, Taxpayer's invoice indicates that the tables were shipped to an Indiana address. Accordingly, the presumption exists that the property was used in Indiana within the meaning of Ind. Code § 6-2.5-3-2. Taxpayer has not otherwise provided sufficient information to rebut this presumption. Further, Taxpayer's ordinary procedure, per their representative, was to have property shipped to the location where the property would be used. In this case, Taxpayer shipped the property to Indiana, which lends further support to the auditor's position.

FINDING

Taxpayer's protest is denied.

II. Sales and Use Tax-Services

DISCUSSION

Second, Taxpayer argues that a number of items for which it was assessed use tax actually represented non-taxable services. For instance, Taxpayer argues that it entered into contracts for installation of property. As part of the installation, Taxpayer was charged for several items, including labor charges that Department concedes are not taxable. However, several items

appeared on the invoices, including fork trucks, gas welders, and “cutting outfits.” The Department concluded that Taxpayer rented or leased tangible personal property in Indiana, and accordingly was responsible for use tax under Ind. Code § 6-2.5-4-10.

Here, Taxpayer has provided sufficient information to conclude that Taxpayer merely purchased for the services of the contractor for installation, rather than the right to the personal property used in the installation process. Accordingly, Taxpayer is sustained.

FINDING

Taxpayer’s protest is sustained.

III. Sales and Use Tax-Out of state purchases

DISCUSSION

Third, Taxpayer argues that a number of items for its appliance control facilities, along a handful of computer-related parts, were not shipped into Indiana. Taxpayer argues that its arrangement is to have a plant order the equipment as necessary, and the part is shipped to that plant. Taxpayer operated facilities that required the items in dispute in multiple states, including Indiana. The auditor noted that the parts in question were shipped from another state into Indiana and that no tax was paid to the states where the parts were shipped. If this is the case, Taxpayer is subject to use tax per Ind. Code § 6-2.5-3-2. A credit is allowable for use tax paid to another state per Ind. Code § 6-2.5-3-5; however, Taxpayer indicated that it did not pay sales or use taxes to the other states.

Taxpayer has not provided further information (e.g, parallel purchases for its Indiana facilities, or information that would allow the Department to compare Taxpayer’s and Department’s respective contentions) that would allow the Department to sustain Taxpayer.

Taxpayer further argues that the items in question were part of its manufacturing process, and accordingly exempt per Ind. Code § 6-2.5-5-3 or -5.1. However, Taxpayer has not provided sufficient information to substantiate this argument.

FINDING

Taxpayer’s protest is denied.

IV. Sales and Use Tax-Real property improvements

DISCUSSION

Fourth, Taxpayer argues that several items for which the auditor assessed tax were items that were incorporated into real estate. As a result, Taxpayer argues that the contractor was responsible for payment of sales tax rather than Taxpayer.

Under Ind. Code § 6-2.5-4-9(a), retail purchases of tangible personal property generally are subject to sales and use tax when the purchaser incorporates the personal property into a structure or other facility, and the property becomes part of the structure.

Generally, 45 IAC 2.2-4-21 to -26 create liability for contractors for sales tax for their purchases of tangible personal property to be incorporated into real estate. Here, however, Taxpayer purchased items of tangible personal property. The tangible personal property became part of Taxpayer's realty via installation by a contractor. Taxpayer is the purchaser and user of the tangible personal property in this instance, and accordingly is subject to tax.

FINDING

Taxpayer's protest is denied.

V. Tax Administration: Negligence Penalty

Finally, Taxpayer protests the assessment of negligence penalties with respect to the assessment. The Department may impose a ten percent (10%) negligence penalty. Ind. Code § 6-8.1-10-2.1 and 45 IAC 15-11-2. Taxpayer's failure to timely file income tax returns, generally, will result in penalty assessment. Ind. Code § 6-8.1-10-2.1(a)(1). The Department, however, may waive this penalty if the taxpayer can establish that its failure to file "was due to reasonable cause and not due to negligence." 45 IAC 15-11-2(c). A taxpayer may demonstrate reasonable cause by showing "that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed...." *Id.* Taxpayer has not made the necessary showing in this case.

FINDING

Taxpayer's protest is denied.